

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition for Rulemaking and Request for	)	MB Docket No. 09-23
Declaratory Ruling Filed By the Coalition	)	
United to Terminate Financial Abuses	)	
<u>of the Television Transition</u>	)	

**REPLY COMMENTS OF THE COALITION UNITED TO TERMINATE  
FINANCIAL ABUSES OF THE TELEVISION TRANSITION**

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## **EXECUTIVE SUMMARY**

The comments confirm the need for prompt action by the Commission to ensure that consumers buying digital televisions (“DTVs”) are not over-charged by approximately \$20 to \$30 per set on account of excessive patent licensing fees. It is undisputed that American consumers will purchase approximately 30 million DTVs in 2009, so that, as RetireSafe stated in its comments, American consumers may be overcharged by nearly \$1 billion in 2009 alone. And that does not include the substantially excessive rates consumers will pay for converter boxes.

Contrary to Funai’s contention, the Commission conditioned its adoption of the Advanced Television Systems Committee (“ATSC”) standard in 1996 on the promise of patent holders to offer licenses on reasonable and nondiscriminatory (“RAND”) terms. It is critical that the Commission insist on licensing under RAND principles. Having mandated the use of the ATSC standard in the United States, the Commission has established conditions that encourage abuse by entities holding patents essential to the ATSC standard because manufacturers have no legal alternative to the use of that standard.

The Commission recognized the possibility of abuse by patent holders in 1996, and promised to take action when needed. That time is now. Yet as Chairman Martin admitted to Congress last year, the Commission does not know who holds patents that are essential to the ATSC standard. Nor does the Commission know how much patent holders charge DTV manufacturers (and ultimately consumers) for patent licenses. The Commission must remedy its ignorance of these basic facts by requiring patent holders to respond to a series of detailed questions listed in these reply comments.

The comments from the patent holders — who urge the Commission not to take any action to protect consumers or even to gather information — criticize the Petition initiating this proceeding for not providing more detail supporting the claim that patent holders are charging \$20 to \$30 per set. They suggest that existing patent pools have solved the problem and imply that licenses essential for manufacturing DTVs may be obtained for \$5 per set. But no one actually disputes the Petition’s claim that the parties making the most extravagant royalty demands have not joined the pool. The attached Declaration (see Exhibit A) shows that patent holders are demanding more than \$24 per set – although confidentiality requirements prevent manufacturers from disclosing each demand. The Commission must require the patent holders to respond to the questions proposed in these reply comments to create the public record needed to ensure RAND pricing.

Some of those questions relate to patent-holder practices that no commenter attempts to defend. For example, the Petition noted that some patent holders tie the right to use patents essential to the ATSC standard to the purchase of additional, unnecessary licenses. Similarly, the Petition alleged that some patent holders sell patents from a portfolio without reducing the price of the portfolio — and the buyer then imposes an additional charge. Particularly since no one defends these practices, which are plainly unreasonable and discriminatory, the Commission ought to declare them to be unlawful.

While gathering this information, the Commission should encourage patent holders to form a pool that includes all essential patents and offers licenses on terms that fulfill the RAND requirement. But if patent holders fail to form a comprehensive pool

complying with RAND principles, the Commission should proceed to enforce the RAND requirement.

There is no merit to the commenters' arguments that the Commission lacks the authority or the expertise to determine whether the rates and terms demanded for DTV licenses are reasonable and nondiscriminatory. As an initial matter, Funai is simply wrong in asserting that the International Trade Commission has determined that its rates are reasonable and nondiscriminatory. It made no such finding. In addition, contrary to assertions made by some of the commenters, the Commission has frequently imposed RAND licensing requirements as part of the standard-setting process and has never hesitated to evaluate whether patent holders' actions meet these requirements. The Commission has authority to take such actions under its statutory authority to impose a DTV standard, its authority to enforce the commitments made in its own proceedings, and its ancillary jurisdiction.

It would be irresponsible for the Commission to fail to act to ensure that consumers are not over-charged billions of dollars over the next few years as they replace their analog televisions with digital sets. It is especially important that the Commission act promptly because the burden of excessive patent fees is particularly acute for elderly and poor consumers who purchase televisions manufactured by Vizio and Westinghouse, which are low-price leaders in the DTV industry, or who must now buy converter boxes to retain access to over-the-air programming

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Vizio, Inc. and Westinghouse Digital Electronics, Inc., working together as the Coalition United to Terminate Financial Abuses of the Television Transition (“CUT FATT”), hereby reply to the comments filed in response to the Commission’s request for comment on CUT FATT’s Petition for Rulemaking and Request for Declaratory Relief. The comments confirm that the Commission should promptly gather the information it needs to determine whether companies holding patents that are allegedly essential to the ATSC standard are offering licenses for those patents at reasonable rates and on nondiscriminatory terms.<sup>1</sup> The Commission also should immediately declare unlawful certain practices that no commenter defends.

**I. THE COMMISSION NEEDS TO GATHER ADDITIONAL  
INFORMATION, BUT IT SHOULD DECLARE SOME ABUSIVE  
PRACTICES UNLAWFUL NOW AND URGE PATENT HOLDERS TO  
FORM AN EFFECTIVE PATENT POOL.**

In the legal discussion in Part II, we show that there is no merit to Funai’s bold claim that the Commission did not establish a RAND requirement in 1996. It bears

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<sup>1</sup> For purposes of this proceeding, CUT FATT assumes and accepts *arguendo* the claims of patent essentiality made by various parties, but reserves the right to challenge those claims.

emphasis at the outset, however, that the Commission would have been derelict in its duties had it not adopted a RAND requirement when it adopted the ATSC standard — and the Commission would be derelict if it does not enforce the RAND requirement now. In adopting the ATSC standard, the Commission essentially acted as a standard-setting organization (“SSO”). As the Third Circuit recently explained, when an SSO adopts a standard, it generally must impose a RAND licensing requirement to prevent the owners of essential patents from “extract[ing] supracompetitive royalties from the industry participants.”<sup>2</sup> The reason is straightforward: when an SSO adopts a standard, the value of the patents essential to that standard is “significantly enhanced.”<sup>3</sup> Without a RAND requirement, patent holders are able to capture this added value by charging “supracompetitive royalties,”<sup>4</sup> a scenario known as an “anticompetitive patent hold-up.”<sup>5</sup> Thus, when an SSO fails to impose a RAND licensing requirements, patent holders collect a windfall, while consumers pay higher prices. For that reason, the court emphasized, binding RAND obligations are critical.<sup>6</sup>

Binding RAND obligations are particularly critical here because, by adopting the ATSC standard, the Commission has prohibited the development of rival standards, thus making it even more likely that ATSC patent holders may abuse the market power

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<sup>2</sup> *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007).

<sup>3</sup> *Id.* at 314.

<sup>4</sup> *Id.* at 310.

<sup>5</sup> *Id.* at 313.

<sup>6</sup> *Id.* (holding that a false promise made to an SSO that a patent holder will license on RAND terms is actionable anticompetitive conduct under the antitrust laws when other requirements of those laws are satisfied).

resulting from adoption of the standard. As the ABA Section of Science & Technology Law noted in its comments, the issue of “RAND royalties in the context of a standard mandated by a regulatory authority ... has not been widely discussed or analyzed in the literature.”<sup>7</sup> That is because such a regulatory mandate is unusual. But it is clear that a regulatory mandate adopting a particular standard enhances the value of a patent even beyond incorporation in a standard not mandated by the government. The Commission therefore must ensure that its promise of RAND pricing is not an empty one.

It also bears emphasis at the outset that ending the existing abuses will benefit consumers. Some commenters suggest that Vizio and Westinghouse should pledge that the savings that will result from RAND pricing will result in price reductions on their televisions.<sup>8</sup> Antitrust concerns counsel against competitors’ making joint statements concerning pricing. But in a competitive market — and the DTV market is competitive, as a number of commenters state — cost reductions should flow through to consumers. Manufacturers offering DTVs at relatively low cost — like Vizio and Westinghouse — should be particularly interested in capturing additional market share by lowering prices when their costs fall. Thus, as former FCC Chief Economist Joseph Farrell and others recently stated, “standards hold-up is also a public policy concern because downstream consumers are harmed when excessive royalties are passed on to them.”<sup>9</sup>

Furthermore, poor and elderly consumers are most likely to benefit from RAND pricing. The attached Declaration of Douglas Woo, the President of Westinghouse

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<sup>7</sup> ABA Section of Science & Technology Law Comments at 3 (Apr. 23, 2009).

<sup>8</sup> *See, e.g.*, Funai Comments at 10 (Apr. 27, 2009).

<sup>9</sup> Farrell et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, § I (2007).



Digital Electronics LLC, shows that patent fees constitute a much higher percentage of the cost of smaller televisions than of larger televisions.<sup>10</sup> In addition, it appears that the cost of patent fees constitutes an even higher percentage of the cost of converter boxes. Accordingly, consumers most in need pay for patents at a higher rate. Thus, the current system is regressive, which is yet another reason for the Commission to ensure that consumers are not burdened by unreasonable or discriminatory rates. And as shown by the more than 19,000 letters supporting CUT FATT's Petition (see Exhibit B), consumers care deeply about the cost of DTVs.

**A. The Commission Should Gather Information from the Patent Holders.**

The Petition alleged that companies claiming to hold patents essential to the ATSC standard are demanding royalties of \$20 to \$30 per set. The patent-holding commenters complain that the Petition did not thoroughly document those figures, but ironically, it is the patent holders who have prevented Vizio and Westinghouse from providing thorough documentation. During licensing negotiations, the patent holders have imposed nondisclosure agreements on manufacturers, preventing Vizio, Westinghouse, and others from revealing the specifics of licensing demands. And while the patent holders complain about the lack of detail in the Petition, they are careful not to disclose their own demands even though they are free to do so.

In any event the Declaration of Douglas Woo shows that, contrary to the suggestions in the comments, patent holders are demanding, in total, between \$24.10 and \$40.10, depending on the size of the television set.<sup>11</sup> It is possible that patent holders are

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<sup>10</sup> Declaration of Douglas Woo ("*Woo Declaration*"), Exhibit A, ¶ 5, and Exhibit to Declaration.

<sup>11</sup> *Id.*

not demanding as much from other manufacturers, but that would raise discrimination issues and support the conclusion that the rate demands made to Vizio and Westinghouse are unreasonably high.

Neither Vizio nor Westinghouse manufactures converter boxes, but have been informed that patent holders demand more than \$12.50 per box.<sup>12</sup> That constitutes an extraordinarily high percentage of the cost of a box. Because federal funds have been used to defray the cost of purchasing boxes, the Commission has a special duty to inquire about these apparently excessive charges.

Moreover, as Mr. Woo states, the cost of purchasing patent licenses for DTVs in Japan is much lower, about \$3.50.<sup>13</sup> American consumers are expected to buy 29 million television sets in 2009. If the average excess cost of patent fees is \$25 per set — a conservative estimate — consumers will be overcharged nearly two-thirds of a billion dollars this year alone.

Furthermore, Mr. Woo explains that the current cost of an ATSC tuner is quite low — about \$2 to \$3.<sup>14</sup> That low amount shows that the Commission's prior efforts to drive down the cost of DTVs have borne fruit.<sup>15</sup> Patent demands totaling many multiples

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<sup>12</sup> We understand that converter box manufacturers must purchase the MPEG-LA, MPEG-2, and Funai licenses on the same terms as television manufacturers. Those licenses cost \$12.50. *See* Exhibit A. In addition, we have been informed that other patent holders make demands on converter box manufacturers that are hidden by nondisclosure agreements.

<sup>13</sup> *Woo Declaration* at ¶¶ 6, 8 (manufacturers must purchase an MPEG-2 license as well as an ISDB license in Japan).

<sup>14</sup> *Id.* at ¶ 7.

<sup>15</sup> *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299-302 (D.C. Cir. 2003) (Roberts, J.) ("The Commission reasonably determined that a phased-in requirement that *all*

of the cost of a tuner seem questionable just for that reason, and certainly contrary to the Commission's efforts to drive DTV prices to reasonable levels. The Commission should not allow unreasonable patent charges to increase the cost of DTVs.

In addition, it bears emphasis that all purchasers of DTVs pay for ATSC patents, even though only over-the-air viewers need ATSC tuners. Since approximately 85% of viewers subscribe to a cable or satellite provider,<sup>16</sup> the vast majority of the expenditure for ATSC patents is unnecessary. Particularly in light of that fact, the Commission should ensure that patent costs are not unreasonably high.

Because of the nondisclosure agreements, Vizio and Westinghouse are not able to state how much each patent holder is demanding. But the patent holders should not be permitted to avoid an assessment of the reasonableness of their licensing demands by declining to disclose their rates, using nondisclosure agreements to prevent others from doing so, and arguing that manufacturers have not presented enough evidence. Instead, the Commission should require patent holders to provide information about their licensing practices so that the Commission can do its job.

Specifically, the Commission should require the 17 known patent holders to respond to the following 13 inquiries. The Commission also should issue a public notice directing any other company claiming to hold patents essential to the ATSC standard to respond. The questions are:

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televisions contain a digital tuner would necessarily increase production volumes and, through economies of scale, lower the price of digital tuners for all television purchasers.”)

<sup>16</sup> *Id.* at 301.

1. Identify any patents you hold that you assert are essential to implementation of the ATSC digital broadcast standard by number and specify each claim of each patent that you contend is “essential.”
2. For each patent and claim identified above, provide (i) a brief, non-technical description of how the claim relates to the ATSC digital broadcast standard, and (ii) a short and plain description of how you acquired the patent rights.
3. State whether you make each claim identified above available for licensing on reasonable and nondiscriminatory terms.
4. Explain in detail how you established the rates and terms for your ATSC essential patent licenses. For example, are your rates based on recovering the cost of developing the intellectual property described in the patents and making a reasonable rate of return on those costs? If so, explain the rate of return you are seeking, how you established that rate, and why you believe that rate is reasonable. Regardless of whether your rates are based on achieving rate of return, state your cost in developing or acquiring all ATSC essential patents and describe how you calculated those costs. For example, if your rates are based on market comparables, explain in detail the comparables you used to establish your rates and explain why you believe they are in fact comparable.
5. State when you established your rates and explain whether you have adjusted those rates to reflect declining costs of digital television sets. In establishing your rates, did you assume retail sale prices for digital television sets that are materially higher than retail sale prices today? If you considered retail sale prices, state what those prices were and how they affected your analysis. Provide copies of all documents that show how you determined your license rates and terms.
6. State when and how you established your rates for DTV converter boxes. In establishing these rates, did you consider the anticipated retail price for DTV converter boxes? Additionally, did you consider the federal rebates provided to assist in the purchase of converter boxes? If you established a flat rate royalty, explain how the same rate is reasonable for a converter box selling for less than \$50 and a 47-inch HDTV selling for many multiples of the cost of a converter box.
7. Explain in detail all terms and conditions on which you make licenses for “essential” claims and patents available to any party, including but not limited to patent cross-licensing arrangements, through settlement of litigation, and/or in connection with licensing of portfolios that include other patents or rights. If you make or have made licenses available at more than one price, or on different terms, identify all such prices and terms and the time periods during which they were offered. Include in your response a specific and detailed explanation of any patent pools through which you make or have made licenses to your ATSC essential patents available. Provide copies of (i) all documents that describe licensing terms you offer or have offered to any party, including but not limited to

demand letters or other correspondence; and (ii) copies of all licensing or cross-licensing agreements that include licensing of your ATSC essential patents (including agreements related to waivers, forbearance, or settlement of litigation or threatened litigation).

8. State whether you manufacture digital television sets and/or DTV converter boxes that implement the ATSC digital broadcast standard. If you do, state whether you sell those televisions in the United States. If so, identify all licenses for ATSC essential patents that you have obtained from other parties in connection with the manufacture and or sale of such televisions and/or DTV converter boxes, summarize the price and other terms of those licenses, and provide copies of those licenses.
9. State whether you hold patents issued by other countries for the technology underlying your ATSC essential patents, or for substantially similar technology used in digital television sets sold elsewhere. If so, state whether you make those patents available for licensing and describe the price and terms on which you make such licenses available.
10. Provide detailed information about your licensing practices related to bundling or tying of ATSC essential patents with other patents that are not essential. Do you make your ATSC essential patent claims available separately from other patents that you license or seek to license? If so, to the extent not fully answered above, explain in detail how you established bundled and unbundled rates and identify those rates and terms.
11. Identify all methods by which you communicate the availability and terms of licensing of your “essential” patents. Do you require licensees and prospective licensees to keep terms of licensing and proposed terms of licensing confidential? If so, explain how such requirements are consistent with reasonable and nondiscriminatory licensing. If you make your essential patents available on nondiscriminatory terms, what is the purpose of confidentiality?
12. In addition to your own essential ATSC patents, what other patents are essential to implementation of the ATSC standard? Identify each essential patent of which you are aware and the owner of each patent. What are the prices and terms for access to those patents? What is the total cost of licensing all patents essential to implementation of the ATSC standard?
13. Do you manufacture digital televisions for sale in countries other than the United States? If so, explain in detail the relative costs of patent licenses necessary to implement the digital television standards used in those countries. For example, what is the relative cost of essential patent licenses to implement the DVB-T and ARIB standards? Do you own any patents essential to implementation of those standards? If you do, describe the patents and the terms and conditions on which you make those patents available to third party manufacturers.

It should be obvious that the Commission cannot ensure RAND licensing without learning the answers to these questions. With respect to rates, it is impossible to determine whether a rate is reasonable without knowing how much is being demanded. It is not a simple matter here to determine what rates are being demanded, in part due to nondisclosure requirements, and the patent holders plainly do not want to say what they charge. It may be that they discriminate by charging different rates to different manufacturers. In any event, the RAND requirement is meaningless if the Commission does not even know how much is being demanded.

Yet the Commission does not know the answers to these questions. Former Chairman Martin's answer to the third question propounded by Senator Kerry, attached to the Petition in Exhibit 2, makes clear that the Commission knows that "[a]t least 17 ATSC participants assert ownership of essential patents which may amount to thousands of claims in hundreds of patents" and not much more.<sup>17</sup> However, unlike some commenters, Chairman Martin's response to that question showed that he understood that, even though some patents have been sold, "[t]he requirement to adhere to the RAND commitment in the ATSC patent statements continues to apply to subsequent rights holders."<sup>18</sup>

If the current patent holders do not form a comprehensive pool charging a reasonable rate, the Commission will need to determine what a reasonable rate would be. As an initial matter, it makes sense to ask the patent holders how they set their rates and why *they* think their rates are reasonable. (Or patent holders can state whether, as is the

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<sup>17</sup> Questions for the Record from Senator Kerry to the Honorable Kevin Martin at Question 3 (attached as Exhibit 2 to the Petition).

<sup>18</sup> *Id.*

case with Funai, they do not believe a RAND requirement exists.) If a patent holder established its rate in order to earn a fair return on its investment, or by using the *Georgia-Pacific* factors that courts use to determine reasonable rates,<sup>19</sup> or by comparing their technology to comparable technology used in Europe or Japan, then its rate might be reasonable. However, in light of the evidence put forth in the Petition, the failure of the commenters to rebut it, and the additional documentation provided in the attached declaration, we are confident the Commission ultimately will determine that the patent holders' requests are unreasonable.

It is in no way unfair to require the patent holders to answer the questions listed above. As the Commission explained in the *1996 Order*, the proponents of the ATSC standard promised to abide by the RAND requirement, and the Commission conditioned its adoption of the ATSC standard on reasonable and nondiscriminatory pricing.<sup>20</sup> No one objected. Many of the patent holders are the same companies that made that promise.<sup>21</sup> And any party that purchased a patent from one of the parties to the "Grand Alliance" knew or should have known that the ATSC standard was premised on RAND

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<sup>19</sup> *Georgia-Pacific Corp. v. United States Plywood Ass'n*, 318 F. Supp. 1116 (S.D.N.Y. 1970); see also *Broadcom Corp.*, 501 F.3d at 314 n.8 (noting that some courts have already applied the *Georgia-Pacific* factors in the RAND context).

<sup>20</sup> Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, 11 FCC Rcd 17,771 (1996) ("*1996 Order*").

<sup>21</sup> See, e.g., *1996 Order*, 11 FCC Rcd at 17774 n.10 (noting that members of the Grand Alliance included AT&T, General Instrument Corporation, Massachusetts Institute of Technology, Philips Electronics North America Corporation, Thomson Consumer Electronics, The David Sarnoff Research Center, and Zenith Electronics Corporation); *id.* at 17784 ¶24 & n.71 (noting that Dolby, Zenith, and Thomson — among others — directly made RAND commitments in comments filed with the Commission); ATSC Patent Statements, A/53 ATSC Digital Television Standard, available at [http://www.atsc.org/policy\\_documents/patent\\_statements.php](http://www.atsc.org/policy_documents/patent_statements.php).

pricing. Having voluntarily assumed the RAND requirement, either by so stating to the Commission or by purchasing a patent with its burdens as well as its benefits, the patent holders cannot reasonably prevent the Commission from obtaining information critical to enforcing the RAND requirement.<sup>22</sup> Similarly, any party that has been a “snake in the grass” — that is, held a patent essential to the ATSC standard before 1996 but waited to assert it until after the Commission adopted the standard — ought not be permitted to ignore the RAND requirement or undermine the Commission’s efforts to enforce it.<sup>23</sup>

In addition, the Commission should not permit patent holders to provide information confidentially because confidentiality is inconsistent with a regime requiring *nondiscrimination*. Indeed, simply banning confidentiality requirements is likely to curtail some of the most egregious demands. For example, a patent holder will not be able to argue that a demand for a \$5 rate is nondiscriminatory if public documents show that it has licensed the patent at \$1 to companies that are similar to the requestor except that they do not compete against the patent holder by offering low-priced digital televisions.

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<sup>22</sup> Most of the entities opposing the requests advanced in the Petition hold patents for ATSC technology, but do not sell DTVs in the United States. Thus, they oppose the Petition simply to protect their patent revenues. Funai and LG hold patents and sell DTVs in the United States, and seek to protect their patent revenues and increase the costs of their competitors.

<sup>23</sup> Robert P. Merges & Jeffrey M. Kuhn, *An Estoppel Doctrine for Patented Standards*, 97 Calif. L. Rev. 1, \*24-\*25 (2009) (“snake-in-the-grass patent enforcement is strategic rent-seeking that results in excessive return to the patentee, and should therefore be estopped by the courts”).



## **B. The Commission Should Declare Certain Abusive Practices Unlawful.**

Although the Commission needs to gather more information, the Commission should immediately declare that some practices are unlawfully inconsistent with RAND pricing. Because the following practices were challenged in the Petition and no party has offered a plausible defense for the practices, the Commission should adopt the following regulations:

1. Companies holding patents on licenses claimed to be essential to the ATSC standard may not refuse to disclose licensing terms except subject to a confidentiality agreement.
2. Companies holding patents on licenses claimed to be essential to the ATSC standard may not require a manufacturer to purchase additional, unnecessary licenses in order to obtain rights to a patent claimed to be essential.
3. If a patent holder sells one or more patents alleged to be essential to the ATSC standard, it must reduce the price of its portfolio to reflect the sale of the patent(s), and the buyer may not price the patent(s) it purchased so as to increase the total cost of the patents prior to the sale.

These three rules are plainly warranted. As already discussed, confidentiality requirements are incompatible with the nondiscrimination requirement, and prohibiting confidentiality agreements is likely to solve some discrimination problems by itself. The second proposed rule — a ban on “tying” nonessential to essential patents — also is plainly warranted. There simply is no good reason to permit patent holders to exploit the market power they obtained when the Commission adopted the ATSC standard by requiring manufacturers to purchase other patents. If a RAND requirement means anything, it must prohibit such exploitation.<sup>24</sup> Third, “accretive disaggregation” —

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<sup>24</sup> As the Supreme Court has stated, “The essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product [here, the essential patent] to force the buyer into the purchase of a tied product [here, the nonessential patents] that the buyer either did not want at all, or might have preferred to

increasing the cost of a patent portfolio by selling some patents to other entities — is plainly inconsistent with RAND pricing. If the reasonable value of a group of patents is a certain amount when held by one entity, there is no reason for the reasonable value to increase when the patents are held by two entities.

Again, although these practices are spelled out in the Petition, no commenter offered a plausible explanation, consistent with a RAND requirement, for the practices. So the Commission should immediately declare them unlawful.

**C. The Commission Should Encourage Patent Holders To Form An Effective Patent Pool, But Should Act To Ensure Rand Pricing, If Necessary.**

The Petition suggested that the Commission should direct entities claiming to hold essential patents to provide information about their claims within 30 days and then should give those entities an additional 90 days to form an effective patent pool. No one disputes that it would be highly desirable for the patent-holding entities to form a comprehensive pool offering a license for all patents essential to the ATSC standard on RAND terms. Some parties suggest that such a pool simply may not develop, at least not in 120 days. But if the Commission directs patent holders to address the questions listed above and makes clear that it intends to enforce the RAND requirement if an effective pool is not formed, there is a reasonable chance that the patent holders will create a comprehensive pool. Accordingly, we reiterate that the Commission should establish a time-frame — and if not 120 days, some other period that recognizes the urgency of the situation — for the patent holders to establish an effective pool before the Commission addresses rates and any other issues regarding patent terms.

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purchase elsewhere on different terms.” *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984).

If no effective pool is formed after the period established by the Commission, the Commission should enforce the RAND requirement. The precise nature of the Commission's actions should await analysis of the patent holders' responses to the questions listed above. But those responses are likely to provide further support for the standard suggested in the Petition — a rebuttable presumption that patent demands exceeding international comparables by more than 50% are unreasonable. While some parties contend that the DTV standards in Europe and Japan are not fully comparable to the ATSC standard — without providing any concrete evidence, but relying instead on conclusory statements to the effect that the ATSC standard is superior — the 50% margin provided in our proposal provides generous breathing room to account for differences. And, as explained in the attached Declaration of Douglas Woo, the large gap between licensing fees in the United States and Japan and Europe cannot be explained by differences in the standards.<sup>25</sup> The key difference is that the ATSC standard was mandated by the Commission and that it is unlawful to sell a television in the United States that does not comply with the standard.

Alternatively, the Commission could assign an administrative law judge (“ALJ”) to determine RAND rates.<sup>26</sup> Using an ALJ to set reasonable rates would be consistent with the Commission's determination to again become an agency that is capable of finding facts.<sup>27</sup> Contrary to the suggestions of some commenters, a typical ALJ would be

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<sup>25</sup> *Woo Declaration*, ¶ 9.

<sup>26</sup> If the parties prefer to use binding arbitration to establish RAND rates and terms, the Commission should allow them to do so.

<sup>27</sup> *See, e.g.*, Acting FCC Chairman Michael Copps, Remarks at FCBA Seminar: The Communications Act and the FCC at 75 (Feb. 24, 2009), *available at* [http://www.fcc.gov/Daily\\_Releases/Daily\\_Business/2009/db0224/DOC-288779A1.pdf](http://www.fcc.gov/Daily_Releases/Daily_Business/2009/db0224/DOC-288779A1.pdf).

as experienced with patent issues as a typical federal district court judge called upon to resolve a patent dispute. Federal judges have crowded dockets, usually including many criminal cases, civil cases of all sorts, and only the occasional patent dispute. In other words, federal judges are generalists. Some ALJs are generalists, but if the Commission thought it desirable to use an ALJ with patent expertise, it appears that it could find one.<sup>28</sup>

Moreover, it would be inappropriate for the Commission to rely on courts, as some comments have suggested, to flesh out the requirements of the RAND licensing requirement. As explained above, it was the Commission that adopted the ATSC standard as a binding federal standard, and it was the Commission that imposed a RAND licensing requirement. As the originator of the RAND requirement, it is likewise the responsibility of the Commission — and not the courts — to determine the meaning and applicability of that rule, particularly because the implementation of the rule will have a profound impact on the success or failure of the DTV transition, a process for which the Commission is responsible.

Nor would it be appropriate for the Commission to rely on other administrative agencies to interpret and apply the Commission's RAND requirement. In fact, many of the agencies mentioned in the comments have had ample opportunity to address the RAND requirements but have declined to do so. For example, in January of 2008, the American Antitrust Institute ("AAI") petitioned the Federal Trade Commission ("FTC") to investigate Rembrandt for failing to honor its RAND licensing obligations for patents

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<sup>28</sup> In certain circumstances, an agency may reemploy a retired ALJ and specify "any special qualifications the retired administrative law judge possesses that are required of the position, such as experience in a particular field, agency, or substantive area of law." 5 C.F.R. § 930.209(d)(4).

essential to the ATSC standard.<sup>29</sup> A year later, AAI again wrote the FTC, citing CUT FATT's Petition in this proceeding and describing "a situation in which many ... parties are blatantly disregarding their RAND commitments to the ATSC standards group and similarly disregarding the FCC's own RAND licensing requirement in connection with its adoption of the ATSC standard."<sup>30</sup> But despite AAI's description of "an industry wide pattern of patent holdup conduct that cumulatively threatens enormous injury to competition, to consumers and to the entire DTV conversion process,"<sup>31</sup> the FTC has so far declined to act.

Nor, contrary to the suggestions of some commenters, does the International Trade Commission ("ITC") provide a suitable forum for determining whether rate demands comply with commitments to RAND pricing. Rather, the typical ITC case arises when a patent holder alleges that a manufacturer is infringing a patent. Only if the ITC finds infringement and then decides to award damages rather than issue an exclusion order will the ITC determine what a reasonable and nondiscriminatory rate would be.

In that connection, Funai is just wrong to assert, without citation, that the Commission should abstain from addressing RAND issues because the ITC "has already

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<sup>29</sup> See American Antitrust Institute's Request for Investigation of Rembrandt, Inc. for Anticompetitive Conduct that Threatens Digital Television Conversion, Federal Trade Commission (Mar. 26, 2008), *available at* [http://www.antitrustinstitute.org/archives/files/AAI%20FTC%20Petition%20Rembrandt%203.26.08\\_040120081130.pdf](http://www.antitrustinstitute.org/archives/files/AAI%20FTC%20Petition%20Rembrandt%203.26.08_040120081130.pdf).

<sup>30</sup> Letter of Albert Foer, President, American Antitrust Institute, to William E. Kovacic, Chairman, Federal Trade Commission, *et al.* (Jan. 13, 2009), *available at* [http://www.antitrustinstitute.org/archives/files/AAI%20on%20DTV%20Conversion.1.13.09\\_011320091842.pdf](http://www.antitrustinstitute.org/archives/files/AAI%20on%20DTV%20Conversion.1.13.09_011320091842.pdf).

<sup>31</sup> *Id.* at 1.

ruled on” the issue.<sup>32</sup> Although Vizio attempted multiple times to raise RAND issues before the ITC, the Commission ultimately declined to resolve them. It never addressed whether the license terms that Funai has offered Vizio are reasonable and nondiscriminatory — and it certainly did not address the royalty terms offered by the other 16 patent holders, who were not even parties to the ITC proceeding. In the ITC proceeding, Vizio argued that Funai lacked standing to seek injunctive relief because it had committed to license the patent on RAND terms. Vizio argued that in that circumstance Funai was limited to obtaining damages — calculated as the amount of a reasonable license rate — and could not seek an exclusion order.<sup>33</sup> However, the administrative law judge declined to address the argument, concluding summarily that there is “no indication that Funai lacks standing in this investigation.”<sup>34</sup> On review before the ITC as a whole, Vizio raised its standing theory again, noting that the administrative law judge had not addressed it.<sup>35</sup> The ITC, however, never addressed the standing issue and certainly did not determine that Funai’s rate demands were reasonable.

But even if the ITC had addressed Vizio’s standing argument, that still would not resolve the questions at issue here. The ITC proceeding involved only two patents held by Funai (patents which have now been held by the U.S. Patent and Trademark Office to

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<sup>32</sup> See Funai Comments at 5; ITC Investigation No. 337-617.

<sup>33</sup> See, e.g., Vizio’s Amended Response to Complaint at 35-36.

<sup>34</sup> ITC Initial Determination at 51.

<sup>35</sup> Respondents’ Petition for Review at 61.

be invalid<sup>36</sup>), while this proceeding involves the abusive practices of numerous patent holders that were never before the ITC.

In short, the Commission cannot rely on other administrative agencies to interpret and enforce a rule imposed by the Commission. The Commission should act to prevent abusive licensing tactics from hindering the nation's transition to digital television.

## **II. THE COMMISSION HAS LEGAL AUTHORITY TO ESTABLISH AND ENFORCE RAND LICENSING REQUIREMENTS.**

Funai erroneously claims that the Commission did not establish a RAND requirement in 1996. In addition, a number of commenters questioned the Commission's authority to establish RAND licensing requirements and to require parties holding essential patents to reveal licensing terms. The Commission has authority to take these actions under (1) its statutory authority to impose a digital-television standard; (2) its authority to enforce the commitments made in its own proceedings; and (3) its ancillary jurisdiction.

### **A. The Commission Adopted a RAND Requirement in 1996.**

Funai makes the bold claim that no RAND requirement exists, apparently under the theory that a rule must be codified in the Code of Federal Regulations to have effect.<sup>37</sup> But there is no such requirement.<sup>38</sup> The Administrative Procedure Act ("APA")

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<sup>36</sup> See Office Action in Ex Parte Reexamination, U.S. Patent and Trademark Office, Control Nos. 90/010,075 & 90/008,828 (Mar. 11, 2009).

<sup>37</sup> Funai Comments at 3, 11-12.

<sup>38</sup> *In re XM Satellite Radio Holdings, Inc.*, 23 FCC Rcd 12348, 12420-22 ¶¶157-58 &160 (2008) (rejecting the argument that the Commission's statement in a prior order was a nonbinding policy statement "rather than a binding Commission rule because it was not codified in the Code of Federal Regulations," citing *Health Ins. Ass'n of Am. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1994) ("In none of the cases citing the distinction, however,

defines “rule” broadly to include “the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”<sup>39</sup> The Commission made such a statement adopting a RAND requirement when it adopted the ATSC standard in 1996. In paragraph 54 of the *1996 Order* the Commission stated it already had determined that patents “would have to be licensed ... on reasonable and nondiscriminatory terms” and “intended to condition selection of a DTV system on such commitments.”<sup>40</sup> In paragraph 55, the Commission declined to establish “specific terms” for patent licensing, but “reiterated” that “adoption of th[e] ATSC] standard is premised on reasonable and nondiscriminatory licensing of relevant patents” and promised that, “if a future problem is brought to our attention, we will consider it and take appropriate action.”<sup>41</sup> The Commission therefore plainly adopted the RAND requirement in 1996 but declined to attempt to spell out how it applied at that time — while promising to do so when and if a problem arose.

Funai contends that the RAND requirement is not enforceable because the Commission referred to it at one point as a “principle,”<sup>42</sup> but that is mere wordplay. The Commission made clear that it had “condition[ed]” adoption of the ATSC standard on RAND pricing and “reiterate[d] that adoption of this standard is premised on reasonable

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has the court taken publication in the Code of Federal Regulations, or its absence, as anything more than a snippet of evidence of agency intent.”)).

<sup>39</sup> 5 U.S.C. § 551(4).

<sup>40</sup> *1996 Order* 11 FCC Rcd at 17794, ¶ 54.

<sup>41</sup> *Id.* at ¶ 55.

<sup>42</sup> Funai Comments at 11-12.



and nondiscriminatory licensing of relevant patents.”<sup>43</sup> That makes RAND pricing a “rule” under the APA. Moreover, although Funai suggests that the RAND requirement is too general to be a “rule,” the phrase “reasonable and nondiscriminatory terms” is similar to the key terms of 47 U.S.C. §§ 201 and 202 and the Commission’s rules implementing those provisions — which require “just and reasonable” rates and terms and prohibit “unreasonable discrimination” by common carriers. Those general principles are nevertheless “rules” that are given concrete meaning in particular cases.

Because the Commission adopted the RAND standard without establishing “specific terms,” Petitioners cannot point to particular rules and say, for example, that a rate that exceeds \$X or the practice of tying essential to nonessential patents already has been determined to be unreasonable. The Commission should decide such issues in this proceeding if the patent holders do not establish a pool that provides all the essential licenses (and only the essential licenses) at reasonable terms. But again, Funai is simply wrong to say that because the Commission did not establish specific terms for patent licenses in 1996 it did not adopt a RAND requirement.

**B. As a Standard-Setting Body, the Commission has Authority to Impose RAND Requirements and to Require Disclosure of Licensing Practices.**

The Commission has authority to take the actions we propose for three separate reasons. First, the Commission can act under its statutory authority to set a DTV standard. That authority, delegated by Congress, allows the Commission to designate the

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<sup>43</sup> *1996 Order*, 11 FCC Rcd at 17794, ¶ 54.

“technology or method ... for the provision of advanced television services”<sup>44</sup> — in other words, to act as a standard-setting body. And as the Third Circuit recently recognized, standard-setting bodies typically can and do “require firms supplying essential technologies for inclusion in a prospective standard to commit to licensing their technologies on FRAND terms.”<sup>45</sup> This function is important not only because it helps to “guard against anticompetitive patent hold-up” once a standard is developed but also because RAND commitments are “a key indicator of the cost of implementing a potential technology” and thus of the suitability of a standard.<sup>46</sup> In ordering patent holders to agree to RAND licensing terms, the Commission thus acted just as any other standard-setting body would — and well within its statutory authority to set the DTV standard.

As a standard-setting body, the Commission also has authority to require essential patent holders to reveal the existence of any essential patents as well as the licensing policies for these patents. That authority has been recognized since at least 1961 when the Commission issued its Revised Patent Procedures.<sup>47</sup> As these Procedures explain,

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<sup>44</sup> 47 U.S.C. §336(b)(1); *see also* 47 U.S.C. § 303(b) (authorizing the Commission to “[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class”).

<sup>45</sup> *Broadcom Corp.*, 501 F.3d at 313 (“FRAND” adds a fairness requirement to “RAND”); *see also* Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (And One Not To)*, 47 B.C. L. Rev. 149, 156 (2007) (“Most obviously, SSOs can, and many do, impose obligations on their members to license patents to others on RAND terms.”).

<sup>46</sup> *Broadcom Corp.*, 501 F.3d at 313.

<sup>47</sup> *See Revised Patent Procedures of the Federal Communications Commission*, Public Notice, 1961 FCC LEXIS 54 (Dec. 1, 1961), reprinted in *In re Amendment of Part 73 of the Commission’s Rules and Regulations (Radio Broadcast Services) to Provide for Subscription Television Service*, Further Notice of Proposed Rulemaking and Notice of Inquiry, 3 F.C.C. 2d 1, Ap. B (1966).

standard setting requires the Commission to obtain “information relating to licensing and royalty agreements” governing patents.<sup>48</sup> In recognizing this authority, the Commission simply recognized that it has the same authority as any private standard-setting body, which typically also require members to disclose all patents essential to any standard under consideration.<sup>49</sup>

A number of the comments feign surprise that the Commission could order patent holders to offer essential patents on reasonable terms, but the Commission has frequently ordered reasonable licensing terms as part of standard-setting proceedings. In adopting the FM stereo standard, for example, the Commission required participants to commit to RAND licensing terms.<sup>50</sup> Similarly, in adopting the AM stereo standard, the Commission ordered Motorola “to license its patents to other parties under fair and reasonable terms.”<sup>51</sup> And in adopting the standard for telephone jacks, the Commission not only required AT&T to license its patents on reasonable terms, but also dictated the specific contract that AT&T was required to offer, as well as maximum royalty percentages it could charge.<sup>52</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1008 (Fed. Cir. 2008) (member of standard-setting organization breached duty to disclose intellectual property rights to private standard-setting organization).

<sup>50</sup> See *In re Amendment of Part 3 of the Commission’s Rules and Regulations to Permit FM Broadcast Stations to Transmit Stereophonic Programs on a Multiplex Basis*, Report and Order, Docket No. 13506 at ¶34 (rel. Apr. 20, 1961), available at [http://louise.hallikainen.org/~harold/BroadcastHistory/uploads/FM\\_Stereo\\_Final\\_RandO.pdf](http://louise.hallikainen.org/~harold/BroadcastHistory/uploads/FM_Stereo_Final_RandO.pdf).

<sup>51</sup> *In re Amendment of the Commission's Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard*, 8 FCC Rcd 8216, 8221 ¶29 (1993).

Similarly, when questions have arisen about whether patent holders have complied with their RAND licensing obligations, the Commission has never questioned its authority to take action. Thus, when there was doubt about whether RAND licensing obligations were being met by the owner of a patent covering digital AM- and FM-radio technology, the Commission investigated the patent holder's licensing policies and indicated that it would "monitor the behavior of the patent holders to determine if the required licensing agreements are reasonable and non-discriminatory."<sup>53</sup> After examining the patent holder's licensing policies, the Commission ultimately concluded that the patent holder had "abided by the Commission's patent policy up to this point" but promised to take "appropriate action" if that changed.<sup>54</sup>

**C. The Commission has Jurisdiction to Enforce RAND Commitments Made in its Own Proceedings.**

Independently of the Commission's powers as a standard-setting organization, the Commission also has authority to enforce RAND licensing commitments because these commitments were made in prior FCC proceedings. As explained in our opening brief, the Commission actually conditioned adoption of the standard on RAND commitments,<sup>55</sup> and before adopting the ATSC standard it solicited and accepted these commitments from all relevant participants — both directly and through its advisory committee.<sup>56</sup> Thus,

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<sup>52</sup> *In re Revision of Part 68 of the Commission's Rules to Specify Standard Plugs and Jacks*, 62 F.C.C.2d 735, 738 ¶ 8 (1976).

<sup>53</sup> *In re Digital Audio Broadcasting Systems And Their Impact on the Terrestrial Radio Broadcast Service*, 22 FCC Rcd 10344, 10384 ¶ 101 (2007).

<sup>54</sup> *Id.*

<sup>55</sup> *1996 Order*, 11 FCC Rcd at 17794 ¶ 54.

participants in the Commission’s Advisory Committee’s “competitive testing process were required to submit a statement that they would” license essential patents on “reasonable and nondiscriminatory terms.”<sup>57</sup> Similarly, many parties made RAND commitments directly to the FCC,<sup>58</sup> and all participants in the FCC’s Advisory Committee process made RAND commitments to the Advisory Committee, which relayed these commitments to the FCC.<sup>59</sup>

Having required and received RAND commitments, the Commission now has clear authority to enforce them. As explained in numerous prior orders, the Commission often accepts voluntary commitments from parties to its proceedings and conditions its rulings on these commitments.<sup>60</sup> When parties violate these commitments — as they

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<sup>56</sup> *Id.*; *In re Advanced Television Systems*, 7 FCC Rcd 6924, 6981-82 ¶78.

<sup>57</sup> *1996 Order*, 11 FCC Rcd at 17794 ¶ 54.

<sup>58</sup> *Id.* at 17784 ¶24 & n.71 (noting that Dolby, Zenith, and Thomson — among others — directly made RAND commitments in comments filed with the Commission).

<sup>59</sup> *Id.* at 17794, ¶ 54.

<sup>60</sup> *See In re Petition of Home Owners Long Distance, Inc.*, 14 FCC Rcd 17139, 17149 n.47 (1999) (explaining that “[t]he Commission often relies on and incorporates into its orders carrier representations” and noting that if a party fails to comply with these voluntary commitments, it risks “enforcement action.”) (citing numerous cases); *In re Applications of NYNEX Corp. Transferor and Bell Atlantic Corp.*, 12 FCC Rcd 19985, 20075-76 ¶ 191 (1997) (accepting voluntary commitments made by parties to a merger, conditioning FCC approval of a license transfer on these commitments, and noting that violation of these commitments could lead to enforcement action including forfeitures); *In re AT&T Inc. and BellSouth Corp, Application for Transfer of Control*, 22 FCC Rcd 5662, 5841 App. F (2007) (accepting “certain voluntary commitments” made by the parties and noting that “all conditions and commitments ... are enforceable by the FCC”) & n.45 (accepting party’s voluntary commitments based on Commission’s authority under 47 U.S.C. §§ 154(i) & (j)).

have done here — the Commission has jurisdiction to take enforcement action,<sup>61</sup> particularly here where enforcement action is necessary to prevent abuse of the Commission’s proceedings for anticompetitive ends.<sup>62</sup>

As explained in the comments submitted by Harris Corporation, some patent holders have attempted to escape their RAND obligations by arguing that the commitments apply only to patent holders who participated in the standard-development process, not to companies that purchase patents from these participants. For example, Rembrandt, which purchased its patent from AT&T, has disclaimed any RAND obligation on the theory that the commitment applies only to AT&T, not to it. The Commission should reject this transparent attempt to undermine its RAND requirements. When companies purchase patents that are subject to RAND obligations, the RAND obligations follow the patents.<sup>63</sup> Thus, as the American Antitrust Institute has explained, “Rembrandt in essence stepped into AT&T IPM’s shoes” and is required to license all essential patents on RAND terms.<sup>64</sup>

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<sup>61</sup> See cases cited in note 58, *supra*.

<sup>62</sup> See *Application of Johnson*, 72 F.C.C. 2d 264, 271-72 ¶ 18 (1979) (“The Commission has long penalized parties who abuse our processes through misrepresentation, anticompetitive practices, and ‘strike’ applications.”); see also *In re Union Oil Co. of California*, 140 F.T.C. 123, 125-26 ¶¶ 3-5 (2005) (false RAND commitments to a government standard-setting body are anticompetitive conduct).

<sup>63</sup> Merges & Kuhn, *supra*, 97 Calif. L. Rev. at \*2-\*3 (discussing recent FTC consent decree with NDATA: NDATA purchased patent from another company, which had made licensing commitments to a standard setting organization; NDATA refused to honor the licensing commitments and was charged with anticompetitive conduct by FTC; case was settled by consent decree); see also *In re Negotiated Data Solutions LLC*, FTC File No. 051-0094, available at <http://www.ftc.gov/os/caselist/0510094/index.shtm>.

<sup>64</sup> AAI *Rembrandt Investigation* at 11.

#### **D. The Commission has Ancillary Jurisdiction to Impose RAND Requirements.**

Finally, even if the Commission did not have direct authority to impose RAND commitments under its standard-setting powers, it would also have ancillary jurisdiction to do so. As the D.C. Circuit recently explained, the Commission may exercise ancillary jurisdiction when “(1) the Commission’s general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”<sup>65</sup> Here, the Commission seeks to regulate the terms of patent licenses necessary to implement digital broadcast television — a subject well within the Commission’s Title I authority — in order to meet its statutory responsibility to adopt a workable digital television standard. Thus, imposing RAND requirements falls within the Commission’s ancillary jurisdiction.

A number of the comments attempt to analogize this case to *American Library Ass’n v. FCC*, where the D.C. Circuit held that the Commission had exceeded its ancillary jurisdiction in imposing the broadcast-flag rule.<sup>66</sup> The analogy is misplaced. The problem in *American Library Ass’n* was that the Commission had imposed a rule on consumer-electronics devices that had nothing to do with the use of the devices in communications. As the court explained, the broadcast-flag requirement exceeded the Commission’s jurisdiction because “the Flag is not needed to make a DTV transmission.”<sup>67</sup> Here, however, ATSC patents *are* necessary for the transmission of the digital-television standard: as the Commission has repeatedly explained, “in order for

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<sup>65</sup> *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 692.

DTV to be successfully implemented, the patents on the technology would have to be licensed to other manufacturing companies on reasonable and nondiscriminatory terms.”<sup>68</sup> Thus, the Commission has ancillary jurisdiction to impose and enforce RAND licensing terms.

Respectfully submitted,

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Dated: May 27, 2009

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<sup>68</sup> *1996 Order*, 11 FCC Rcd at 17794 ¶ 54.



## CERTIFICATE OF SERVICE

I, Mark D. Davis, hereby certify that a true and correct copy of the foregoing Reply Comments of the Coalition United to Terminate Financial Abuses of the Television Transition was served, via first class mail, this 27th day of May, 2009 upon:

<p>Patricia A. Griffin Vice President and General Counsel American National Standards Institute 25 West 43<sup>rd</sup> Street, 4<sup>th</sup> Floor New York, NY 10036</p>	<p>Stephen D. Samuels President <i>Thomson Licensing, LLC</i> <i>Two Independence Way</i> <i>Princeton, New Jersey 08540</i></p>
<p>George T. Willingmyre, P.E. GTW Associates 1012 Parrs Ridge Drive Spencerville, MD 20868</p>	<p>Advanced Television Systems Committee, Inc. c/o W. Scott Petty King &amp; Spalding LLP 1180 Peachtree Street, NE Atlanta, GA 30309</p>
<p>Dan Bart President and CEO Valley View Corporation 4312 Haverford Drive Rockville, MD 20853</p>	<p>Harris Corporation 600 Maryland Avenue, S.W. Suite 850E Washington, D.C. 20024</p>
<p>Mitsubishi Electric Corporation c/o Michael K. Mutter Birch, Stewart, Kolasch &amp; Birch, LLP 8110 Gatehouse Road Suite 100 East P.O. Box 747 Falls Church, VA 22040</p>	<p>Zenith Electronics LLC c/o Richard E. Wiley John M. Burgett John W. Kuzin Wiley Rein LLP 1776 K Street, N.W. Washington, D.C. 20006</p>
<p>Thomas B. Patton Vice President, Government Relations Philips Electronics North America Corp. 1300 I Street, NW, Suite 1070 East Washington D.C. 2005</p> <p>John I. Taylor Vice President, Government Relations &amp; Communications LG Electronics USA, Inc. 1776 K Street, NW Washington, DC 20006</p>	<p>Alexis M. DeVane General Counsel MPEG LA, LLC 5425 Wisconsin Avenue Suite 801 Chevy Chase, MD 20815</p>

<p>Funai Electric Co., Ltd. and Funai Corporation, Inc.  c/o Cheryl A. Tritt  Morrison &amp; Foerster, LLP  2000 Pennsylvania Avenue, N.W.  Suite 6000  Washington, D.C. 20006</p>	<p>KONINKLIJKE PHILIPS ELECTRONICS N.V.  R.J. Peters  Executive Vice President,  Philips International B.V.  Chief Executive Officer,  Philips Intellectual Property &amp; Standards  PO Box 220  5600 AE  Eindhoven,  The Netherlands</p> <p>QUALCOMM INCORPORATED  Dean R. Brenner  Vice President  Government Affairs  2001 Pennsylvania Ave., N.W.  Suite 650  Washington, D.C. 20006</p>
<p>Rob Glidden  1 Laird Drive Moraga, CA 94556</p>	<p>Shawn Taylor Kaminski  Director  American Bar Association  Section of Science &amp; Technology Law  321 N. Clark Street  Chicago, IL 60654-7598</p>
<p>Michelle Plasari  President  RetireSafe  1900 Campus Commons Drive, Suite 100  Reston, VA 20191</p>	
<p>Brendan Murray  Federal Communications Commission  Media Bureau  Room 4-A737  455 12th Street, SW  Washington DC 20554</p>	

**EXHIBIT A:**

**Declaration of Douglas Woo**

## DECLARATION OF DOUGLAS WOO

1. I am President of Westinghouse Digital Electronics ("WDE") and have served in that position since 2003. Based in Southern California, WDE offers a wide array of digital televisions. Among my responsibilities as President is the duty to oversee the company's acquisition of licenses to use patents essential to the production of digital televisions using the Advanced Television Systems Committee ("ATSC") standard mandated by the Federal Communications Commission. I graduated from Harvard Law School in 1985 and, among other positions, I was a partner at Pillsbury, Madison & Sutro, focusing on intellectual property issues, before joining WDE.

2. My purpose in making this Declaration is to respond to certain statements made by commenters in MB Docket No. 09-23, *In re Petition for Rulemaking and Request for Declaratory Ruling Filed by the Coalition United to Terminate Financial Abuses of the Television Transition*. Those commenters suggest that there is no basis for the statement in the Petition initiating the proceeding that entities claiming to hold patents essential to the ATSC standard are seeking royalties of more than \$20 per set. They point to a patent pool license offered by MPEG LA (the acronym is derived from "moving pictures experts group – licensing association") that is offered for \$5, and suggest that it is the only license needed to manufacture DTVs using the ATSC standard. In fact, WDE has received demands from parties claiming to hold patents essential to the ATSC standard that total \$24.10 to \$40.10 depending on the size and price of the television.

3. In addition, as also discussed in this Declaration, some patent holders have engaged in a variety of unreasonable and discriminatory practices. For example, some patent holders "tie" nonessential licenses to essential licenses – that is, they will not

license an essential patent unless WDE buys a nonessential license as well. Patent holders also have sold allegedly essential licenses from a portfolio of essential licenses without reducing the price of the portfolio, resulting in higher demands when the buyer of the license “stacks” its demand on top of existing demands. Some patent holders have increased their demands over time, after WDE decided against taking an early license.

#### **Unreasonable Rate Demands**

4. MPEG-LA offers a license for \$5 covering a number of patents essential to the ATSC standard. However, many entities claiming to hold patents essential to that standard are not covered by that patent pool. Although the Commission adopted that standard in 1996, some of those entities have come forward in the last few years, as the digital transition approached, demanding royalty payments. Indeed, as recently as April 2009 WDE received an initial demand from one company claiming to hold an essential patent. WDE has found it very difficult to plan licensing of patents essential to the ATSC standard as there is no reliable list of available licenses.

5. The table in the Exhibit to my declaration shows various license demands received by WDE from entities claiming to hold patents essential to the ATSC standard. Certain of these entities “tie” nonessential licenses to essential licenses as noted above. Some patent-holding entities refuse to provide rate demands unless WDE agrees not to disclose the amount of the demand, and some entities require WDE to sign nondisclosure agreements in order to obtain a license. Therefore, I cannot provide details of certain confidential rate demands; these entities are grouped together in the Exhibit as “Confidential Licensors” with their royalty rates totaled. Some licensing entities demand a flat rate without regard to the size or price of the television. Others vary their demands,



with the rate depending on the size of the television, or in certain cases depending on the net selling price of the television. The total rate demands range from \$ 24.10 for a 19-inch television to \$ 40.10 for a 47-inch television. These demands have a regressive effect on consumer pricing: the demands for a 19-inch television represent a significantly higher portion of the average shelf price than the demands for a 47-inch set.

6. The licenses in the Exhibit include a \$ 2.50 royalty for the MPEG-2 portfolio license because MPEG-2 video compression is part of the ATSC standard, just as it is part of the ISDB and DVB-T international digital television standards discussed below. The MPEG-2 Patent Portfolio License differs from MPEG-LA's ATSC Patent Portfolio License in that the former, with twenty five members, has succeeded in gathering the great majority of licensors in its field whereas the latter, with seven members, has not. Furthermore, during the life of the MPEG-2 Patent Portfolio License the royalty decreased from \$ 4.50 to \$ 2.50, whereas the ATSC Patent Portfolio royalty has never decreased.

7. The cost of licenses to practice the ATSC standard exceeds the \$ 2-3 cost to manufacture ATSC tuners by a considerable amount. Furthermore, whereas the cost of ATSC hardware has decreased significantly over time patent licensing costs have generally not decreased over time.

8. WDE also sells digital televisions in Japan. Japan has an effective patent pool for digital television licenses (the ISDB family of standards), and WDE is able to buy a pool license in Japan for 100-200 yen – approximately \$1-2. WDE does not sell digital televisions in Europe, but I am aware that Europe also has an effective patent pool that permits manufacturers to buy a license to use the patents essential to the DVB-T

standard for 0.75 Euros – also approximately \$1. The \$2.50 MPEG-2 portfolio license is separate from the Japan and Europe digital television pool licenses and therefore this \$ 2.50 royalty should be added to the Japanese and European digital television pool license royalties in comparing these royalties with the royalties shown in the Exhibit.

9. Various commenters have questioned whether pool licenses under the Japanese ISDB digital television standards and European DVB-T standard are valid comparables to the ATSC standard, but clearly these standards all address the same market requirement with comparable quality. The video subsystem, based upon the MPEG-2 standard, is the same in all digital television standards. There are tradeoffs in transmission performance among the standards: DVB-T and ISDB-T use multiple carriers signals (OFDM) that are better suited for mobile applications, whereas the single carrier system of ATSC provides a larger data payload per MHZ. However, these transmission differences are only of secondary importance from a market perspective.

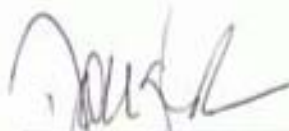
10. WDE agrees that patent holders are entitled to reasonable payments from manufacturers. WDE contends only that patent holders are not entitled to charge unreasonably high rates for licenses to use their patents and believes that patent holders are making unreasonably high demands because the Commission has mandated the use of the ATSC standard. In that circumstance, WDE and other manufacturers seeking to sell DTVs in the United States have no alternative and, therefore, no bargaining power to force patent holders to reduce their demands to reasonable levels. Ultimately these high patent demands have injured consumers, as the demands have limited WDE's ability as a supplier to the value segment of the market to reduce our every day prices, especially for smaller sized DTVs.

### **Unreasonable and Discriminatory Practices**

11. WDE does not believe all the patents covered by the various demands it has received from patent holders are essential to the ATSC standard. However, it is not uncommon for patent holders to require manufacturers to purchase nonessential as well as essential patents. In fact, several companies have demanded that WDE purchase licenses needed to build analog televisions – which WDE does not manufacture – in order to obtain a license for patents claimed to be essential to the ATSC standard. From a practical perspective, the result is the same as a demand for licenses for essential patents only: WDE must either purchase the licenses for nonessential as well as essential licenses or face litigation claiming that it has infringed the entity's essential patent, which could result in an order prohibiting WDE from distributing televisions in the United States.

12. In addition, as noted previously, WDE often is required to sign a confidentiality agreement in order to obtain an offer from an entity claiming to hold an essential patent. Similarly, a typical condition of obtaining a license is that WDE must sign a nondisclosure agreement.

Executed on May 26, 2009.



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Douglas Woo  
President, Westinghouse Digital  
Electronics, LLC  
12150 Mora Drive  
Santa Fe Springs, CA 90670



## EXHIBIT

Licensors	19"	26"	32"	40"	42"	47"
Mpeg2 <sup>1</sup>	\$2.50	\$2.50	\$2.50	\$2.50	\$2.50	\$2.50
Dolby <sup>2</sup>	\$1.30	\$1.30	\$1.30	\$1.30	\$1.30	\$1.30
Wi-LAN <sup>3</sup>	\$0.65	\$0.65	\$0.65	\$0.65	\$0.65	\$0.65
Funai <sup>4</sup>	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00
MPEG LA <sup>5</sup>	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00	\$5.00
Thomson	\$3.50	\$4.00	\$4.00	\$4.50	\$4.50	\$5.00
Confidential Licensors <sup>6</sup>	\$6.15	\$7.65	\$8.45	\$10.20	\$14.30	\$20.65
<b>Total</b>	<b>\$24.10</b>	<b>\$26.10</b>	<b>\$26.90</b>	<b>\$29.15</b>	<b>\$33.25</b>	<b>\$40.10</b>

1 - MPEG-2 is part of the ATSC standard and hence is included in this table; see paragraphs 6 and 8 of the Declaration.

2 - Royalty figures represent average royalty based upon WDE sales volume history

3 - DTV V-Chip Technology Requirement, 47 C.F.R. § 15.120(d).

4 - Funai offers alternative licensing terms: \$5/unit for ATSC portfolio; or 0.75% NSP (min \$1/max \$2.50) for "TV" bundled ATSC/non-ATSC worldwide TV portfolio

5 - ATSC Patent Portfolio Licensors: Koninklijke Philips Electronics N.V.; LG Electronics Inc.; Mitsubishi Electric Corporation; Panasonic Corporation; Samsung Electronics Co., Ltd.; Scientific-Atlanta, LLC; Zenith Electronics LLC; Zenith Electronics also offers a license under its ATSC essential patents at \$ 5.00/unit

6 - Licensors with confidential royalty demands. Royalty figures are total royalty of confidential licensors, including royalty estimates based on net selling price

## **EXHIBIT B:**

### **Letters Supporting CUT FATT's Petition**

*The two attached letters are examples of the more than 19,000 letters collected in support of CUT FATT's Petition. Copies of all letters were submitted to the FCC on a CD. Copies of the letters are available at <http://hdtvshakedown.com/doc.pdf> and [http://www.cutfatt.org/Letters\\_to\\_FCC.pdf](http://www.cutfatt.org/Letters_to_FCC.pdf). (Each site contains different letters.)*

**May 26, 2009**  
**Chairman Copps**

**Federal Communications Commission**  
**445 12th Street, SW**  
**Washington, D.C. 20554**

Dear Chairman Copps:

Please stand up for consumers and stop blatant patent abuses from foreign companies that increase the price of digital TVs in the United States.

While Americans are willing to pay a fair price for digital televisions, we are not willing to be victim to uncontrolled price gouging. With the conversion to digital television slated for June 12, 2009, consumers will be overcharged up to \$1 billion and perhaps more by parties controlling rights to use the ATSC digital television standard adopted by the FCC in 1996. You can stop this! Please hold these patent holders to their "free or reasonable" licensing obligation.

Sincerely,  
Todd Resudek  
Madison, WI 53704  
todd@resudek.com

cc:  
Commissioner Adelstein  
Commissioner McDowell

May 26, 2009

Chairman Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Dear Chairman Copps:

Please stand up for consumers and stop blatant patent abuses from foreign companies that increase the price of digital TVs in the United States.

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Sincerely,

Robert Delaney  
Arizona 85743  
Rdelaney20@comcast.net

cc:

Commissioner Adelstein  
Commissioner McDowell